percent. Certainly, minority interests such as these would not raise anti-competitive concerns and should not preclude a qualified telecommunications company like Vanguard from holding PCS licenses in those same markets.

In addition, should the Commission adopt a PCS licensing framework that is not based on MSA and RSA market areas, the cross-ownership threshold should take into account the portion of the MTA or BTA served by the cellular carrier. For example, the markets served by Vanguard's SuperSystem in portions of Pennsylvania, New Jersey and New York comprise a minor part of the New York MTA. In fact, the aggregate population within Vanguard's cellular markets in this area constitutes approximately 6.2 percent of the total population in the New York MTA. Without an appropriate ownership threshold that permits such de minimis interests, Vanguard would be prohibited from filing an PCS application for the New York MTA. Finally, the Commission should also adopt a multiplier for ownership interests of less than 51 percent. Thus, if a cellular carrier owned a 25 percent interest in a cellular market that included only 10 percent of the total population of the PCS market area, the cellular carrier's attributable interest for cellular-PCS cross-ownership purposes would be 2.5 percent.

In the event the Commission adopts a cellular eligibility restriction for PCS, Vanguard recommends that

the Commission adopt a cross-ownership threshold of 20 to 25 percent. These ownership thresholds are comparable to the longstanding alien ownership benchmarks contained in Section 310(b) of the Communications Act of 1934, as amended, and successfully employed by the Commission to ensure that certain United States communications facilities are not controlled by foreign interests. Absent other factors affecting control, an equity interest within this range is sufficiently small to eliminate any possible anti-competitive concerns.

VIII. THE COMMISSION SHOULD ACT TO ASSURE THAT THE PCS RULES DO NOT UNFAIRLY DISADVANTAGE CELLULAR CARRIERS IN THE MOBILE COMMUNICATIONS MARKETPLACE.

As the Notice acknowledges, it is likely that PCS and cellular carriers "will compete on price and quality."[23/] Such competition is inevitable because PCS and cellular carriers will be seeking to serve some of the same markets and is likely to be widespread if the Commission adopts technical rules that permit PCS carriers sufficient flexibility to provide cellular-like service. In this context, the Commission should make sure that there is a level playing field for cellular-PCS competition by creating a common environment for the two services. In order to do so, the Commission should liberalize the technical

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23/ Notice at 5701.

requirements for cellular operators, adopt renewal standards for PCS that parallel those for cellular and classify both cellular and PCS under the same regulatory rubric.

A. Liberalizing Cellular Technical Rules.

The Commission has recognized that PCS is a family of services and that, consequently, differing technical standards may be applicable to different market niches.[24/] Unless cellular carriers can adapt their services to respond to the competitive challenge from PCS operators, the Commission risks marginalizing cellular operators and limiting the availability of an important set of existing mobile services. For this reason, the Commission should, simultaneous with the adoption of PCS rules, amend the cellular rules to give cellular carriers flexibility equal to that afforded PCS carriers.

Granting this flexibility goes beyond the Notice's proposal to permit cellular operators to provide "PCS-type services" without any prior approval or notification.[25/] While amending its rules to permit cellular carriers to provide wireless PBX, data transmission and telepoint services is appropriate, the Commission should also remove

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24/ Notice at 5728.

25/ Notice at 5704.

all other limits on a carrier's competitive choices.[26/] This includes, among other things, the current requirement that cellular carriers provide standard AMPS service.

Eliminating the requirement to provide AMPS service is an important element in helping cellular carriers to meet the challenge posed by PCS. While there can be little doubt that the market will support AMPS service for years to come, it also is true that, eventually, the market will evolve to the point where AMPS is no longer a meaningful part of the cellular service. For instance, as digital cellular phones replace analog phones, the number of phones requiring AMPS will inevitably decline. The Commission should not go through the time-consuming, wasteful process of modifying the rules at some later date to recognize a change that will already have taken place in the market. Instead, the Commission should act now to give cellular carriers additional flexibility to respond to market changes as they occur.

Continued liberalization of the cellular rules will serve the public interest for many reasons. First, and most important, it will help to create a level playing field for

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26/ As the Commission has noted in other contexts, radio common carriers, unlike private carriers, are prohibited by statute from providing dispatch service. See 47 U.S.C. § 332(c)(2). However, if the Commission acts to place PCS and cellular under the same regulatory regime, then the differences between private and common carriage become irrelevant. See Section VIII(c), infra.

competition between PCS and cellular providers. If PCS providers are permitted to offer a wider range of services than cellular carriers, then cellular carriers will lose the long run competitive battle. This would sacrifice an important industry while depriving consumers of the full range of choices that otherwise would be available to them.

In fact, limiting cellular operators to their currently-authorized services would have an effect much like the 1960s decision to allow FM broadcast stations, but not AM stations, to broadcast in stereo. The result in that case was that FM stations prospered while AM stations withered. Even the eventual decision to permit AM stereo broadcasting has not fully revived the industry. The same result would obtain if cellular were not permitted the freedom to compete fully and fairly with PCS. Thus, liberalization of the cellular rules is necessary.

Liberalization of the cellular rules also would continue an important trend. As the cellular industry has matured, the Commission has recognized that innovation is best nurtured by permitting carriers to experiment with different services in order to find the mix that best meets their customers' needs. This recognition led to the Commission's 1988 decision to permit additional services, including advanced digital cellular, on existing cellular

systems[27], and its 1990 decision to simplify the requirements for providing BETRS service.[28]

Thus, if the Commission seeks to create full and fair competition, it is important to make sure that cellular operators have all of the opportunities that will be afforded to PCS operators. This requires liberalization of the rules to permit cellular carriers to provide PCS services and to eliminate artificial strictures on cellular operators' choices of what markets to serve. Failure to take these steps could seriously undermine the competitive position of the cellular industry.

B. Adopting Cellular Renewal Standards.

Another element of a level playing field is the nature of the expectations the Commission has for licensees in the PCS and cellular services. Just as the rules should permit cellular and PCS operators to provide the same services, the Commission should hold them to the same standards at renewal. Consequently, the Commission should set a ten year license term for PCS systems and apply existing cellular renewal expectancy requirements to PCS licensees.

27/ Amendment of Parts 2 and 22 of the Commission's Rules to Permit Liberalization of Technology and Auxiliary Service Offerings in the Domestic Public Cellular Radio Service, Report and Order, 3 FCC Rcd 7033 (1988).

28/ Amendment of Parts 2 and 22 of the Commission's Rules to Permit Liberalization of Technology and Auxiliary Service Offerings in the Domestic Public Cellular Radio Service, Order on Reconsideration, 5 FCC Rcd 1138 (1990).

The ten year license term is appropriate for a variety of reasons. In addition to providing parity with cellular and paging operators, a ten year license term would give a PCS operator a reasonable opportunity to develop its system. In ten years, a licensee should be able to construct its facilities, bring them into full operation and provide the public with a broad range of services. This will give the Commission sufficient data on which to base renewal decisions.

Moreover, the standards adopted for cellular renewal are well suited to PCS. As the Commission explained in its Cellular Renewal Order, renewal expectancies are justified for non-broadcast services like cellular and PCS, in part because of the risk that an incumbent licensee's acceptable service will be replaced by inferior service in the absence of an expectancy.[29/] Because the services provided by PCS operators will be similar in kind to those of cellular operators, it also is appropriate to use the same criteria for a renewal expectancy. Thus, the Commission should evaluate PCS renewal applications on the basis of whether the licensee:

> (1) substantially used its spectrum for its intended purpose; (2) substantially complied with applicable

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29/ Amendment of Part 22 of the Commission's Rules Relating to License Renewals in the Domestic Public Cellular Radio Telecommunications Service, Report and Order, 7 FCC Rcd 719, 720 (1991).

> Commission rules, polices and the Communications Act; and (3) had not otherwise engaged in substantial relevant misconduct[.][30/]

Those that meet these criteria should be entitled to a renewal expectancy. PCS should be held to neither a higher nor a lower standard than cellular in order to assure that the playing field remains level.

C. Using a Consistent Regulatory Regime.

Efforts to assure that cellular and PCS carriers can provide the same services and have the same renewal standards are important. It is, however, at least equally important to fair competition that the fundamental regulation of cellular and PCS carriers, i.e., their status as private or common carriers, also is the same. As the technologies and services of cellular and PCS converge, regulating them differently would be manifestly unjust.

As a threshold matter, there is no reason to regulate two such similar services differently. As cellular and PCS develop, they will look more and more alike, and differences will be most likely to result from differences in marketplaces, not differences in capabilities. Adopting common carrier regulation for one service and private carrier regulation for the other would lead to advantages in the marketplace that would have little or nothing to do with the relative merits of the services offered.

30/ Id. at 720.

For instance, cellular is subject to state regulation because it currently is classified as common carriage, while a private carrier would be exempt from such regulation.[31/] In Vanguard's case, state common carrier regulation means that it must bear the costs of required state proceedings, change its rates and service offerings only after undergoing regulatory scrutiny and, in the states of New York, Ohio and West Virginia, pay assessments to cover the cost of such regulation. Private carriers have none of these costs and constraints.

Given these clear, competitively important differences between common carrier and private carrier regulation, it would be arbitrary to classify cellular and PCS differently. Thus, whatever decision the Commission reaches regarding the classification of PCS operators should be applied as well to the cellular service. If this requires reclassifying all or some of the services offered by cellular carriers, the Commission should take that step as well. This kind of regulatory equity is just as important as any other element of the level playing field that should exist for cellular and PCS operators.

31/ Compare 47 U.S.C. § 152(b)(2) with 47 U.S.C. 332(c))(3).

IX. IN THE ABSENCE OF COMPETITIVE BIDDING AUTHORITY, THE COMMISSION SHOULD USE LOTTERIES TO AWARD PCS AUTHORIZATIONS.

Of the three PCS licensing mechanisms discussed in the Notice, Vanguard believes that competitive bidding best serves the Commission's goals of expediting the licensing process, reducing the administrative burden on the Commission's staff, and minimizing the filing of purely speculative applications. Obviously, competitive bidding would also help generate substantial new federal revenue.

However, subsequent to the Commission's adoption of the Notice, Congress failed to pass enabling legislation that would have given the Commission limited competitive bidding authority. In view of this development, Vanguard recommends that the Commission utilize lotteries rather than comparative hearings for the selection of PCS licensees. The number of applications filed for authorizations in the cellular RSA and 220 MHz private land mobile services demonstrate, however, that the Commission must adopt even more stringent application requirements to minimize the filing of merely speculative PCS applications. In this regard, Vanguard recommends that the Commission require PCS applicants to meet strict financial requirements, adopt a stringent anti-trafficking rule and prohibit interests in more than one application for each PCS market (except for certain interests in publicly held companies).

Vanguard supports the use of the strict financial qualification test applicable to applicants for nationwide 220 MHz private land mobile systems. Thus, each PCS applicant would be required to file with its application an itemized estimate of the costs of constructing 40 percent of its proposed system and operating that system for four years. The applicant must also submit either evidence of net liquid assets or a firm financial commitment from a recognized lending institution in an amount sufficient to cover these construction and operating costs. Vanguard generally supports the rules developed by the Commission in the cellular RSA proceeding for determining the sufficiency of applicants' internal and lender financing.

To further reduce speculative lottery schemes, Vanguard would also prohibit any individual or entity from owning interests in more than one application for each PCS market, except that ownership interests of 5 percent or less in publicly traded entities would not be cognizable for purposes of this restriction. In addition, the Commission should select only one lottery winner for each PCS authorization. If the original selectee is later disqualified, the Commission should conduct a re-lottery for that authorization.

Consistent with the strict anti-alienation rule adopted for RSA applicants, the Commission should prohibit the

assignment, transfer or other alienation of any interest in a pending application for a PCS authorization. Moreover, a PCS licensee should be prohibited from assigning or transferring control of a PCS authorization before completing construction and operating its system for three years. However, this three-year restriction would not apply to transactions involving an exchange of authorizations between or among PCS licensees. Finally, the PCS application filing fee should bear a reasonable relationship to the Commission's actual cost per application of receiving and processing PCS applications and awarding initial construction authorizations.

Vanguard submits that the above requirements would help reduce the filing of purely speculative applications for PCS authorizations. However, Vanguard would support such other application requirements that are designed to ensure PCS applications are filed only by qualified entities who intend to construct and operate PCS systems.

X. CONCLUSION.

As a leading provider of advanced mobile communications services in numerous markets throughout the country, Vanguard supports the Commission's efforts to establish a regulatory framework that will ensure a rich diversity of affordable personal communications services. As Vanguard demonstrates in these Comments, licensing 20 MHz of PCS

spectrum to each of five competing providers in the nation's MSA and RSA markets would best promote the competitive delivery of a diverse assortment of personal communications services specifically tailored to meet the needs of people on the move. In licensing these new services, the Commission should permit and encourage cellular industry participation in all markets or risk losing the significant economies that will be achieved by allowing cellular licenses to establish PCS networks in their cellular market areas. Finally, at the same time it adopts its PCS rules, the Commission must liberalize its cellular rules to ensure that cellular carriers are not unfairly disadvantaged in the mobile communications marketplace.

Respectfully submitted,

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By: _____
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November 9, 1992

DECLARATION OF ROBERT SHAW

DECLARATION

I, Robert Shaw, do hereby state under penalty of perjury, that the following is true and correct:

1. I am RF Systems Engineer for Vanguard Cellular Systems, Inc. ("Vanguard") and have held that position since September 1990. In that position, I oversee cellular system engineering design and operation of many of Vanguard's 21 cellular telephone systems which serve approximately 90,000 subscribers throughout the eastern United States.

2. Prior to working for Vanguard, I was an engineer concentrating on private microwave frequency coordination matters at Comsearch in Reston, Virginia, from August 1989 to September 1990.

3. From May 1987 to September 1989, I was an engineer in the FM Radio Branch, Federal Communications Commission ("FCC").

4. I received by B.S. degree in Electrical Engineering from the University of Pittsburgh in 1987.

5. I am familiar with the proposals of the FCC relating to allocation of spectrum for personal communications services ("PCS") in GEN Docket No. 90-314 and ET Docket No. 92-100.

6. Based upon my experience in mobile telephony, it is my opinion that an allocation of 20 MHz in the 1.8 GHz band for a PCS license is more than sufficient to permit design and implementation of a system providing PCS services. PCS systems will experience much greater frequency efficiencies through use of digital modulation technologies than current analog cellular systems.

7. Furthermore, through utilization of a microcellular design and reduced power level from end user units, the PCS systems will inherently benefit from increased frequency reuse. Finally, the increased free space path loss resulting from the higher frequency band will permit greater channel reuse by reducing adjacent channel interference levels.

8. It is my opinion that a PCS licensee operating with 20 MHz of bandwidth in the 1.8 GHz range will effectively be in a position to provide the same array and quantum of services that a cellular operator can provide in the 800 MHz band with 25 MHz bandwidth. This is especially so if there is a spectrum reserve for PCS in the 1.8 GHz band.

Robert L Shaw

Robert Shaw

Date: November 6, 1992